Fox Painting Company *and* International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL-CIO. Case 9-CA-16050

August 16, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On January 29, 1982, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

As a remedy for Respondent's unlawful abrogation of the current terms of its collective-bargaining agreement with the Union, the Administrative Law Judge, *inter alia*, recommended that Respondent be ordered to make those payments which should have been made to the Union's health and welfare trust fund under the terms of that bargaining agreement. We conclude that this remedy is insufficient to the extent that it does not order that all payments due to similar funds under the agreement likewise be made, including those to the vacation fund, inadvertently omitted from his recommended remedy, and to the education fund. We agree with the Administrative Law Judge's limitation of the remedy only to the extent of not ordering Respondent to make payments into the industry advancement fund involved herein. See *Finger Lakes Plumbing & Heating Co., Inc.*, 254 NLRB 1399 (1981).[2] Accordingly, we shall revise the Order to include that payments be made to these other funds. We further order any interest applicable to such payments be made in accordance with the criteria set forth in *Merryweather Optical Company*, 240 NLRB 1213 (1979).[3] In adopting the Administrative Law Judge's additional remedy that Respondent be held liable to the Union for any loss of dues, we rely exclusively on Respondent's obligation to honor the union dues-checkoff provision in the bargaining agreement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Fox Painting Company, Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(c):

"(c) Reimburse all employees in the bargaining unit, the funds established under the bargaining agreement (excluding the industry advancement fund) and the Union for any losses they may have suffered as a result of Respondent's abrogation of the collective-bargaining agreement from and after May 7, 1980, with interest, in the manner prescribed in the Board's Decision."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT withdraw recognition from International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL-CIO, as the duly designated representative of our employees in a unit appropriate for collective bargaining.

WE WILL NOT abrogate the duly negotiated collective-bargaining agreement entered into on our behalf with International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL-CIO.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[1] Respondent in its exceptions correctly states that charges against it were filed with the Joint Trade Board on July 13, not July 31, 1980.

[2] See, generally, *Allied Chemical & Alkali Workers of America Local Union No. 1 v. Pittsburgh Plate Glass, Chemical Division, et al.*, 404 U.S. 157 (1971).

[3] Member Jenkins would award interest on Respondent's other backpay due based on the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

WE WILL forthwith implement and, if requested, sign the April 1, 1980, contract between Blue Grass Chapter, Painting and Decorating Contractors of America, and the above-named labor organization, and any renewal, extension, or modification thereof, and give retroactive effect thereto from May 7, 1980.

WE WILL make whole all employees in the bargaining unit and the Union for lost dues and for any losses of wages or health benefit coverage as the result of our abrogating the terms of said agreement, with interest.

WE WILL make whole our employees by paying to the various fringe benefit funds, excepting the industry advancement fund, the contributions which should have been made pursuant to the provisions of the above contract.

FOX PAINTING COMPANY

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: The Respondent is a sole proprietor painting contractor who in 1978 decided it was to his advantage to become a "union contractor." He did so by signing the existing collective-bargaining agreement between International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL-CIO (herein the Union), and the Blue Grass Chapter of the Painting and Decorating Contractors of America (herein PDCA). Then in the summer of 1980[1] he decided to cease being a "union contractor." This case concerns his attempt to do so by abrogating the then existing collective-bargaining agreement and refusing thereafter to recognize the Union as the collective-bargaining representative of his employees.

The General Counsel alleges that the Respondent's abrogation of the collective-bargaining agreement and its withdrawal of recognition were violative of Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

The Respondent admits that he became a party to the 1978 collective-bargaining agreement between the Union and PDCA; however, he maintains that the contract expired on March 31, 1980, and he did not become a party to the successor agreement. Therefore it was not unlawful for him to cease complying with its terms or to cease recognizing the Union.

Upon the record[2] as a whole, including my observation of the witnesses, the briefs, and the arguments of counsel, I hereby make the following:

[1] All dates are 1980 unless otherwise indicated.

[2] Though there are numerous errors in the transcript, detailed correction is not necessary inasmuch as the errors are either not material or the correct reading is obvious from the context.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent, Fox Painting Company (herein Fox or the Respondent), is owned and operated by John Fox and is engaged as a painting contractor for residential, commercial, and industrial structures with its principal place of business in Lexington, Kentucky. During the 12 months preceding the filing of the complaint herein, the Respondent performed services valued in excess of $50,000 in States other than the Commonwealth of Kentucky. I conclude that the Respondent is, and at all material times herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union has 150 to 200 members who are engaged in the trade of painting commercial, industrial, and residential structures. For many years the Union has been recognized as the collective-bargaining representative of employees of the PDCA, a multiemployer association, in the following unit, admitted by the Respondent to be appropriate for purposes of collective bargaining:

> All employees (engaged in painting) employed by (Respondent); but excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

The Union and PDCA have negotiated a series of collective-bargaining agreements. I conclude that the Union is, and at all material times herein has been, an organization existing for the purpose of representing employees of employers engaged in interstate commerce with regard to wages, hours, and other terms and conditions of employment and therefore has been, and is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The facts giving rise to this controversy are essentially undisputed. They begin in December 1978 when Fox went to the Union's business agent, Walter Douglas Young, and said that he wanted to become a union contractor. Young took Fox to the next meeting of the Joint Trade Board, which is set up pursuant to the collective-bargaining agreement to resolve disputes thereunder and consists of equal numbers of employer and union members. At this December 1978 meeting Fox was asked whether he wanted to be union for one particular job only or if he had in mind a continuing relationship with the Union. Fox assured the Board that he intended to become and remain a union contractor, since, he asserted, he was already paying at or near union scale. Apparently some vote of approval was taken and Fox signed the then existing collective-bargaining agreement between the Union and PDCA. He thereafter complied with its terms, including paying the appropriate wage rate to unit employees, making the appropriate remit-

tances to the fringe benefit funds, and, pursuant to the Union's security clause, required new employees to become members of the Union.

Fox never became a member of PDCA, although on several occasions he told Carl Radden, the PDCA and Joint Trade Board secretary, that he would join. Radden testified that when he would ask Fox about joining Fox would say he did not have the necessary $150. Fox did, however, use the services of PDCA, as well as the national body, in matters unrelated to the events herein.

In January 1980, by certified letter, Young advised PDCA:

> I have been instructed by President Jim Jones to inform you that the membership of Painters Local Union #768 through a special called meeting, met and introduced their proposals for a new contract. As you know our current agreement expires March 31, 1980. A negotiating committee has been selected and will meet at your convenience.

In early March, representatives of the four members of PDCA along with Fox had a preliminary meeting to discuss their bargaining strategy. At this meeting Fox participated. Among other things, he argued that they should press for a helper classification, an idea of which was never formerly advanced during negotiations.

In any event, representatives of the four contractors along with Fox then met with representatives of the Union for their first negotiation session. Not much of substance occurred at this meeting, although Fox did state that he felt the Union's proposal with regard to room and board expenses for out-of-town work was too high.

Following the first negotiation session, the employers again met in a strategy session and determined to select two of their number to act as a bargaining committee, primarily so they would have the same advantage as they perceived the union negotiators to have; that is, any agreement reached would depend on ratification by the whole group. A "straw vote" was taken with Radden and the representative of another contractor being selected as the negotiating team. Fox participated in this vote.

On March 31, the two negotiating teams reached an agreement which was thereafter ratified by the union membership and implemented by each of the contractors, including Fox. This agreement was basically an addendum to the then existing contract, relating primarily to travel pay, wage and fringe benefit rates, plus the requirement that each employer should be required to post a $2,500 surety bond.

Except for the requirement to post a surety bond, Fox implemented the changes and he continued to abide by the terms of the 1978 contract which were not altered. He stated that he was never asked to furnish a surety bond. According to the testimony of Young, Elizabeth Reardon, the secretary for Fox, called for and received the addendum. She did not deny she had done so.

The addendum was signed by Radden as secretary of the Joint Trade Board and filed. It was not signed by any union officer. Indeed, there is a conflict between Young and Radden as to whether the Union ever executed the 1978 agreement.

In any event, beginning April 1, Fox implemented the addendum to the collective-bargaining agreement and, as of at least mid-April, all of his field employees in the bargaining unit were members of the Union.

According to Fox, the first time he hired an employee and did not require that employee to become a member of the Union was in May; but he testified that the influx of nonunion employees commenced in August.

John Jackson testified, without contradiction, that he first became employed by Fox on April 9 or 10. The supervisor told him that after 7 days he would have to join the Union. After he had worked 7 days he talked to Fox about this matter: "He [Fox] said just to hold off, that he was going non-union—getting done with the union jobs."

By June, Fox was beginning to get in arrears on contributions to the health and welfare fund and, as a result, on July 31, Young filed charges with the Joint Trade Board, charging that Fox had: failed to check off dues for April, May, and June; failed to make vacation fund deposits for April, May, and June; failed to pay the prevailing wage rate; and failed to notify the Union under the "8-day security clause of new employees."

Fox, along with PDCA and union members on the Joint Trade Board, was notified that a meeting would be held on July 22 to consider the charges. And a certified letter was sent by Radden to Fox advising him specifically of the charges brought by Young. Fox was not present at the meeting of July 22 but his attorney, C. Wayne Shepherd, represented him and asked that the meeting be continued to July 31, which it was.

At the meeting on July 31, Shepherd tendered to the Joint Trade Board Fox's checks and reports for dues for June and May, his June payment to the vacation fund, and a check for the May contribution to the education and industry development fund. And Shepherd asked the Board to give Fox 3 additional weeks to get the amounts paid to the health and welfare fund ($1,859.05). The Board approved the imposition of certain penalties against Fox for his delinquencies and set up a payment schedule.

There was another meeting of the Board on August 14 at which it was noted that a check in the amount of $84.61 had been received from Fox on August 13 but there was no indication of what that check was for. At this meeting testimony was taken from individuals who stated that they had been working for Fox for less than the wage rate set forth in the addendum to the collective-bargaining agreement. Fox was levied a fine of $2,000 at this meeting plus an additional $1,000 if he did not get current by August 31 and was so notified by letter of August 15.

According to Fox's testimony, he ceased to recognize the Union "the date that they held the trial and excluded my attorneys about the middle of August of 1980." And again, according to Fox's testimony, thereafter came the influx of employees who were not required to join the Union and whom he paid substantially less than the rate required under the collective-bargaining agreement. Further, as to all of his employees, he ceased making pay-

ments to the various fringe benefit funds or remitting dues pursuant their checkoff authorizations.

B. *Analysis and Concluding Findings*

There is no question but that Fox started becoming delinquent as to some obligations under the collective-bargaining agreement beginning in May 1980. There was some discussion concerning this and attempts on his part to become current. But in August he totally abrogated the contract.

Fox maintains he was not bound by the new agreement inasmuch as the 1978 contract expired by its terms on March 31, 1980. Thus his acts were neither breach of contract nor an unfair labor practice.

The General Counsel contends, and I agree, that Fox was a party to the collective-bargaining agreement between PDCA and the Union and that his abrogation of its terms and his withdrawal of recognition from the Union were violative of Section 8(a)(5) of the Act.

It is clear that the 1980 agreement was simply an addendum to the more comprehensive collective-bargaining agreement entered into between PDCA and the Union in 1978, to which Fox became a party in December 1978. Fox not only executed that contract, but also implemented its terms and indeed took an active role in the affairs of the Joint Trade Board under the contract.

The Union's January notification was to modify the terms of the contract, not to terminate it. After at least one bargaining session, the Union gave PDCA a list of proposed changes—not a complete new contract.

Fox participated with the other employers in their first two strategy sessions as well as participating actively in the first negotiating session with the Union. Further, at the second strategy session of employers, Fox authorized, by his participating in the vote, Radden and the other employer to negotiate on his behalf. And following agreement between the negotiating teams, Fox secured a copy of the addendum, and implemented it.

Never did Fox give any indication that he did not authorize Radden to negotiate on his behalf, nor did he ever indicate that following March 31 he would no longer be bound by the collective-bargaining agreement or the addendum. In short, by his acts, Fox made Radden (or PDCA) his agent to negotiate the new collective-bargaining agreement and by his actions after April 1 ratified the acts of his agent by adopting and implementing the collective-bargaining agreement. The fact that he did not sign the addendum is immaterial, for it is clear that signing this contract by any of the parties was never meant to be a condition. Only Radden signed it, as secretary of the Joint Trade Board. Clearly signing the contract by any of the parties, including Radden on behalf of his company, would have been a mere ministerial act. Since members of the Union ratified the agreement, and since it was at least partially implemented by Fox, formal execution was not necessary. There was in force after April 1, 1980, a contract binding on Fox. *Chevron U.S.A. Inc.*, 244 NLRB 1081 (1979).

Further, at the time the Union ratified and Fox implemented the new agreement, all his employees in the bargaining unit were members of the Union.

I conclude that after April 1, 1980, Fox had a collective-bargaining relationship with the Union and at that time entered into a valid and enforceable collective-bargaining agreement.

It may be that some of the fines levied against Fox by the Joint Trade Board in August were excessive and possibly not collectible in an action on them under Section 301 of the Act. However, the Respondent offered no authority for the proposition that, by levying such fines, Fox thereby was relieved of his obligations to recognize the Union or to abide by the terms of the collective-bargaining agreement. I conclude that the Joint Trade Board's attempt to bring Fox into compliance with the contract did not serve to extinguish his obligations under it.

Further, it is noted that, even after Fox began to fall behind in some of his obligations under the collective-bargaining agreement, he still attempted, through his attorney, to become current. He tendered checks to the Joint Trade Board for remission to the appropriate fringe benefit fund as late as August. Never during the Joint Trade Board meetings did Fox or his attorney take the position that Fox was not bound by the collective-bargaining agreement. In short, all of his actions until about mid-August are to the effect that Fox considered himself to be bound by the collective-bargaining agreement as, I conclude, he was.

I further conclude that when Fox abrogated the collective-bargaining agreement and withdrew recognition from the Union in mid-August, he thereby breached his obligations to bargain collectively in good faith as required by Section 8(d) of the Act. He therefore violated Section 8(a)(5). *Gordon L. Rayner and Frank H. Clark, d/b/a Bay Area Sealers*, 251 NLRB 89 (1980).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's business as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that the Respondent unlawfully abrogated the collective-bargaining agreement and withdrew recognition from the Union, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall order the Respondent to recognize the Union as the collective-bargaining representative of the employees in the bargaining unit described above. The Respondent will be ordered to rescind and revoke the unlawful abandonment of the terms and conditions for unit employees of the PDCA contract with the Union effective April 1, 1980; and enforce the terms and conditions of that agreement, and any renewal, extension, or modification thereof; and give retroactive effect to all such terms and con-

ditions to May 7, 1980, or the date of any change,[3] until the Respondent and Union reach an agreement or impasse.

The Respondent will be ordered to make whole the employees in the unit found appropriate for any loss of wages or other benefits they may have suffered as a result of the Respondent's abrogation of the contract and withdrawal of recognition, with interest as provided for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

The Respondent will also be ordered to make those payments which should have been made to the health and welfare trust fund[5] but without interest. *Merryweather Optical Company*, 240 NLRB 1213 (1979). In addition, the Respondent will reimburse any unit employee for premiums he may have paid to a third-party insurance company for medical coverage and for any medical bills any employee paid directly to a health care provider that the contractual policy would have covered. *Angelus Block Co., Inc., Amari, Inc.*, 250 NLRB 868 (1980).

Finally, the Respondent will be ordered to pay the Union for any loss of dues, with interest thereon, as a result of the Respondent's failure to comply with the collective-bargaining agreement, or any renewal, extension, or modification thereof so long as said contract continued to contain a valid union-security clause. *J. F. Swick Insulation Co., Inc.*, 247 NLRB 626 (1980).

Upon the foregoing findings of fact and conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, Fox Painting Company, Lexington, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Abrogating the terms of the collective-bargaining agreement to which it has become a party.

(b) Withdrawing recognition from the duly designated collective-bargaining representative of the majority of its employees in a unit appropriate for collective bargaining.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[7]

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Recognize and, upon request, bargain with International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 768, AFL-CIO, as the duly designated collective-bargaining representative of its employees in the following unit appropriate for purposes of collective bargaining:

> All employees engaged in painting employed by Fox Painting Company; but excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) Abide by the terms of the collective-bargaining agreement entered into between PDCA and the Union in 1978 as amended on April 1, 1980, and any renewal, extension, or modification thereof until the Respondent and the Union reach a new agreement or impasse.

(c) Reimburse all employees in the bargaining unit, the health and welfare fund, and the Union for any losses they may have suffered as a result of the Respondent's abrogation of the collective-bargaining agreement from and after May 7, 1980, with interest (on wages and dues) as provided for in the remedy section above.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this Order.

(e) Post at its Lexington, Kentucky, facility copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[3] The charge herein was filed November 7, 1980, hence Sec. 10(b) prohibits the remedy of any violation occurring prior to May 6.

[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[5] The only other funds under the contract (education and industry development) are nonmandatory subjects of bargaining, hence it was not unlawful under Sec. 8(a)(5) for the Respondent to refuse to make those payments. *F.M.L. Supply, Inc.*, 258 NLRB 604 (1981).

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] The Respondent's acts in this matter indicate a proclivity to engage in unfair labor practices and accordingly the broad injunctive relief is appropriate. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."